



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 101 OF 2018

GEMSTAR IMPORTERS.....1st APPELLANT

JACKSON JUMA.....2nd APPELLANT

-VERSUS-

**EDWARD NTHIWA MUTISO (Sued as a legal representative of the Estate of
the CHARLES NZIKOK NTHIWA-Deceased).....RESPONDENT**

(Being an Appeal from the decision of Senior Principal Magistrate's Court, Mavoko delivered on the 12th July, 2018 in PMCC No. 249 of 2015)

**EDWARD NTHIWA MUTISO (Sued as a legal representative of the Estate of
the CHARLES NZIKOK NTHIWA-Deceased).....PLAINTIFF**

-VERSUS-

GEMSTAR IMPORTERS.....1ST DEFENDANT

JACKSON JUMA.....2ND DEFENDANT

RULING

1. By a Motion on Notice dated 10th August, 2018, the applicants herein seek that the decree given on 12th August, 2018 by **Hon Kassin** in Mavoko PMCC No. 249 of 2018 and all consequential orders and steps be stayed until this appeal is heard and determined.
2. The said application was supported by an affidavit sworn by **Betty Isoe**, a legal officer of the appellant's insurer who deposed that the appellants were the defendants in the said suit in which the parties recorded a consent on liability in the ratio of 80:20 in favour of the Respondent on 31st May, 2017. On 12th July, 2018, the trial court entered judgement against the appellant in the sum of Kshs 1,075,320.00 plus costs. It is the appellants' case that by then their submissions were not on record.
3. Being dissatisfied with the said decision the appellants have lodged this appeal. They confirmed that they are ready and willing to comply with any order given by this court regarding security of the decretal sum. Since judgement was delivered on 12th July, 2018, the appellants believed that this application was made at the earliest opportunity. They are however apprehensive that there is imminent of execution by the Respondent, a step which would cause the applicants substantial loss due to the fact that the Respondent's financial status is unknown hence the appellants stand to lose the decretal sum thereby rendering the appeal nugatory.
4. In their submissions, the appellants reiterated the foregoing and stated that the Respondent has *failed or ignored to prove that he is not a man of straw as no document was attached to the replying affidavit of **Phanuel Omondi** dated 22nd August, 2018 to prove that the Respondent owns some assets or even a copy of the Respondent's bank statement. The Appellant relied on inter alia, **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR.***

5. The application was however opposed by the Respondent. According to the Respondent, through a replying affidavit sworn by his advocate, **Phanuel Omondi**. According to the said affidavit, the Applicant has on numerous occasions sought to subvert justice by causing inordinate or immoderate delay to the hearing and determination of this matter; for instance, on the 6th April, 2017 when this matter came for hearing the Appellant failed to appear though they were duly served with the appropriate notice. Thereafter, two mention dates were fixed to confirm filing of submissions; whereby the Appellant in the first date being 19th May, 2017 sought time to put in its submissions and the court granted them the said leave and they were to file submissions by 31st July, 2017 a date taken by consent which was disregarded or ignored by the Applicant thus the court issued a judgment date of 28th August, 2018.

6. It was averred that the Appellant thereafter applied to set aside the judgment entered on 28th September, 2017 on the grounds that they were not appropriately served and wished to have the matter heard afresh. By a ruling dated 28th September, 2018, the court allowed the Applicant a further opportunity to defend said claim against them.

7. It was deposed that the parties entered into a consent on liability on 29th July, 2017, whereby the Respondent herein was to shoulder 20% liability while the Appellant herein was to shoulder 80% liability and the issue of quantum was to be dispensed with vide submissions as agreed on 24th April, 2018. The parties finally confirmed filing of submissions on the 5th June, 2018 and said judgment date on the matter was set for 12th July, 2018 following the consensus, agreement, accord and/or consent by parties herein.

8. The Respondent lamented that in a now familiar or recognizable pattern of disruption the Appellant has moved to this court seeking stay orders in a manoeuvre, ploy and/or gambit to cause further delay in a matter whereby parties have indeed consented on every avenue in the cause of action and a just determination has been pronounced based on the evidence before the trial court.

9. In the Respondent's view, the proposed Appeal has no chance of success and further the Applicant has not demonstrated that it would suffer substantial loss if the decretal amount is paid to the Respondent.

10. In the submissions filed on his behalf, the Respondent contended that present Application is malicious, an abuse of court and further devoid of merit. It is an afterthought only meant to frustrate the Respondent from enjoying the fruits of judgment issued by a court of competent jurisdiction after both parties had indeed consented on liability and further seeks to violate an Order of this Honourable Court. According to the Respondent, it has always been the courts position not to deprive a successful litigant of his fruit of success as sought in this Application the Order for stay if granted will be oppressive.

11. The Respondent contended that since the award sought herein is a monetary decree, the court have formed the opinion that the court should not grant stay in monetary decrees and relied on **Madhupaper c Crescent Construction Civil Application Number Nairobi 60 of 1990** where it was held that it is not normal for the court to grant a stay in monetary decrees. It was emphasised that the judgement on liability was a consent judgement and that the Applicant cannot therefore rely on vague and general assertions in pursuit of stay. In that respect the Respondent relied on **Pan African Insurance Company (U) Ltd vs. International Air Transport Association Misc Appl. No. 86 of 2006**, where it was stated that an applicant should go further to lay the basis upon which court can make a finding that the Applicant will suffer substantial loss as alleged and should not just make vague and general assertion of substantial loss in the event a stay is not granted. In this case the Respondent contended that the Applicant has brought forth no reason why the consent judgment should be set aside and further no rationale or reason has been set stating why the award issued is exorbitantly high. To the Respondent, the Estate lost a young enterprising dynamic individual whom hence the award issued was way below the standard set.

12. The court was also urged to take note of the conduct of the Applicant in making a decision whether or not to exercise discretion in their favour. To the Respondent, the actions of the Applicant do not warrant this court's indulgence since they have approached the court with unlean hands. Accordingly, this application is a cunning and blatant attempt by the Applicant to frustrate the Respondent and ultimately delay the course of justice hence the application should be dismissed with costs

Determination

13. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions filed as well as the authorities relied upon.

14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

15. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation

of any of its provisions. According to section 1A(2) of the *Civil Procedure Act* “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.*

17. The same position was adopted by *Kimaru, J* in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the *status quo* pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

18. This was the position of *Warsame, J* (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss... Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

19. On the first principle, *Platt, Ag.JA* (as he then was) in *Kenya Shell Limited vs. Kibiru [1986] KLR 410*, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

20. On the part of *Gachuhi, Ag.JA* (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

21. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

22. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

23. Where the allegation is that the respondent will not be able to refund the decretal sum if paid to him in satisfaction of the decree, the burden is upon the applicant to prove that that is the position. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

24. The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

25. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success. Suffice to say as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

26. In this case, the applicants have deposed that the financial status of the Respondent is unknown hence they are apprehensive that the Respondent will not be able to refund the decretal sum in the event of a successful appeal. Lack of knowledge of the financial means of a successful litigant, however, is not one of the grounds for denying him the fruits of his judgement. Suffice too state that he is, at this moment, the successful party and to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime.

27. In this case however, there is no averment from the Respondent that he is capable of refunding the sum that may be paid to him. The replying affidavit is sworn by his advocate rather than himself. The said affidavit has dwelt mainly on what transpired at the hearing rather than on the financial ability of the Respondent. This court cannot close its eyes to the fact that the Respondent is an estate of a deceased person. Clearly therefore in the event that the Applicants succeed in the appeal, recovery of the sum paid may be difficult particularly as the Respondent has not disclosed the estate’s source of income, if any.

28. As regards to the issue whether or not the applicant stands to suffer substantial loss in **Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005** the Court of Appeal citing **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nai. 358 of 1999** it was held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized. In the latter case the amount in question was Kshs. 4,000,000.00. Therefore, if the applicant were to prove that if compelled to settle the decretal sum it may well fold up hence be disabled in pursuing his otherwise merited appeal, the Court may, while also taking into account the prospects of the Respondent being able to be paid if the appeal were to fail, grant the stay sought.

29. The Respondent contended that in monetary decrees stay ought not to be granted. That, with due respect, is not exactly the legal position. In **Madhupaper Case** (supra) the Court used the word “normally. In other words, it is not normal in such decrees that the appeal or intended appeal would be rendered nugatory. What the Court was saying, in my view, was that since the issue is quantifiable, the same may not be rendered nugatory since money being a commodity of trade can always be refunded. However, that position assumes that the other party may refund the same. Accordingly, where the successful party shows that he is in a position to refund the decretal sum and that the sum in

question is not such that it is likely to make the applicant go under, the court would be very reluctant to grant the stay sought. The statement in *Madhupaper Case* was subsequently qualified by the Court of Appeal in **Transouth Conveyors Limited vs. Kenya Revenue Authority & Another Civil Application No. Nai. 37 of 2007** where it was stated that:

“It has become necessary for the court to qualify the usual principle that the success of a money decree, so long as it is certain that the respondent was capable of repaying the decretal sum, would not render an intended appeal nugatory. The qualification has got to do with the interests of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated.”

30. It was therefore appreciated by the same court in **Nation Newspapers Limited vs. Peter Baraza Rabando Civil Application No. Nai. 1 of 2007** that:

“Although the respondent’s is a money decree, recent decisions of the Court are to the effect that in certain cases, an appeal against a money decree, if successful, may be rendered nugatory, and the court granted a stay in those cases. In such cases, however, the court balances two parallel positions. First, that a litigant if successful should not be deprived of the fruits of a judgement in his favour without just cause. The second factor is that, if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay, may be on terms.”

31. This court appreciates the legal position in **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR**, where it was held that:

“.....Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

32. While in this case, it is not contended that the applicant’s insurers are likely to fold up, the amount herein was awarded to an estate of the deceased. However, in light of the consent order on liability, the intended appeal can only succeed, if at all on quantum and it is clear from the memorandum of appeal, that the appeal is restricted to quantum. There is therefore a realisation that at the end of the day some amount is likely to be awarded to the Respondent.

33. In the premises, there will be a stay of execution pending this appeal on condition that the Applicants remit to the Respondents half of the decretal sum and deposit the other half in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date hereof. In default, this application shall be deemed to have been dismissed with costs

34. The costs of this application are awarded to the Respondent in any event.

35. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of May, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anam for Mr Mwaura for the Appellant/Applicant

CA Geoffrey